87-877

Supreme Court, U.S.
FILED
NOV 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TIMOTHY S. JOVANOVIC,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHEN ON DIRECT APPEAL FROM GUILTY PLEA: WHERE THE COURT OF APPEALS HAS REVIEWED A RECORD SHOWING A PLEA BY A TEENAGER WHO IS ADDICTED TO PCP, WHO HAS BEEN REINCARCERATED THREE DAYS BEFORE THE PLEA, WHO HAS DECIDED TO PLEAD GUILTY WHILE REINCARCERATED, WHO AT THE PLEA SHOWS CONFUSION IN HIS RESPONSES, AND WHERE THE DISTRICT JUDGE HAS FAILED TO INQUIRE INTO THESE CIRCUMSTANCES, HAS MISTATED THE SPECIAL PAROLE TERM, AND ENGAGED IN AN ADMITTEDLY CONFUSING EXCHANGE REGARDING THE MAXIMUM POSSIBLE JAIL TERM AND ITS SIGNIFICANCE;

(1) WHETHER THIS RECORD DEMONSTRATES A VOLUNTARILY PLEA?

(2) WHETHER RULE 11(H) RENDERS THESE ERRORS HARMLESS?

(3) WHETHER THERE REMAINS DISTINCT STANDARDS FOR REVIEW OF A DIRECTED APPEAL AND A HABEAS PETITION?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Timothy Jovanovic and the Respondent, the United States of America. Additionally, Kipp Michael McGeehan, represented by Lee Lawless of 1114 Market Street, Room 841, St. Louis, Missouri 63101, was a Co-Appellant at the Court of Appeals for the Eighth Circuit.

Additionally, co-defendants at the District Court Level were Jeffrey Allen Scheve, who was represented by Mr. Robert Ciuffa of 1250 South Big Bend, St. Louis, Missouri, and Sandra Hauser, who was represented by Lewis Greene, Jr., of 314 North Broadway, St. Louis, Missouri. Counsel does not believe that any of the additional parties retain an interest in or will be affected by the outcome of this Petition.

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TIMOTHY S. JOVANOVIC,
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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Timothy S. Jovanovic, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-styled proceedings on July 29, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 824 F.2d 677, and is reprinted in the Appendix hereto.

No opinion was issued by the United States District Court for the Eastern District of Missouri (Nangle D.J). The Judgment of the District Court is reprinted in the Appendix hereto.

JURISDICTION

On June 10, 1986, the United States of America charged petitioner with three (3) counts in violation of 21 U.S.C. §841 (a)(1). Petitioner on August 18, 1986, entered pleas of guilty to all three (3) counts. The District Court sentenced petitioner on September 23, 1986, and entered its Judgment and Commitment Orders on January 12, 1987.

On January 22, 1987, petitioner filed Notice of Appeal, appealing said Judgment and Orders of Commitment and requesting that he be allowed to plead anew. Jurisdiction of the appeal was pursuant to 28 U.S.C. §1291 and §1295.

Co-defendant, Kipp Michael McGeehan, also filed appeal regarding his conviction by jury. The appeals were consolidated and submitted to a panel of the Eighth Circuit, United States Court of Appeals on June 11, 1987. The Court of Appeals issued its opinion on July 29, 1987, affirming the Judgment of the District Court as to petitioner Jovanovic.

Petitioner filed a Petition for Rehearing with the United States Court of Appeals for the Eighth Circuit on August 12, 1987. On September 24, 1987, the Court of Appeals denied petitioner's Petition for Rehearing.

The jurisdiction of this Court to review the Judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1) and Sup. Ct. R. 20.1.

STATEMENT OF THE CASE

Petitioner was indicted on June 10, 1986, for three (3) counts alleging violation of 21 U.S.C. §841 (a)(1). Co-defendants charged in the indictment were Kipp McGeehan, Sandra Hauser, and Jeffrey Scheve. Count I of the Indictment alleged a conspiracy to distribute in excess of five (5) grams of Lysergic Acid Deithylamide (LSD), a Schedule I "narcotic" drug controlled substance. Count VIII alleged distribution in excess of

five (5) grams of Lysergic Acid Deithylamide (LSD), a Schedule I "narcotic" controlled substance. Count X alleged distribution in excess of five (5) grams of Lysergic Acid Deithylamide, a Schedule I "narcotic" controlled substance.

Petitioner was a 19 year old who was suffering from a addiction to the drug PCP. While free on bond, petitioner continued the use of the mind altering chemical and as a result was reincarcerated and had his bond revoked on August 15, 1986.

Three days later, petitioner, along with two (2) of his Co-defendants, entered pleas of guilty in relation to the Government's indictments. Mr. Jovanovic plead guilty to all three (3) counts without having arranged any form of plea bargain. The other two (2) defendants who were pleading that day, have arranged plea bargains.

At the Rule 11 hearing, petitioner's attorney indicated to the District Judge that petitioner's bond had been revoked a few days earlier, due to his continued drug use. Petitioner indicated to the Court that he was addicted to PCP. Petitioner's attorney further indicated to the Court that Mr. Jovanovic had made his decision to plead guilty to all three (3) counts during the period when he had been taken back into custody.

At one point the Court had asked the petitioner to provide some detail in regard to one of the elements of the conspiracy count. Petitioner indicated that he did not remember. (TR 23). At another point, the Court asked petitioner about the transfer of monies in relation to the conspiracy and the defendant indicated that he didn't know. (TR 25). At another point, the petitioner gave an inappropriate response to a question from the Court regarding the authenticity of the drug. (TR 33, 34).

When the District Court began to inform petitioner of the possible maximum aggregate penalty, it initially indicated that it would be sixty (60) years. At that point, the following exchange occurred between the District Court, Mr. Dana, the U.S. Attorney, and Mr. Sorreli, petitioner's attorney:

MR. DANA: Fifty years. Fifteen and fifteen plus thirty and plus twenty.

MR. SORRELL: VIII and IX —

THE COURT: VIII and IX, at least down here they got twenty years.

MR. SORRELL: It should be fifteen.

MR. DANA: That's an error. It should be fifteen.

THE COURT: That's an error and it's an important error. (TR 16) . .

(THE COURT): I have a pretty strong hunch that five years is not going to make a difference. I don't want to mislead you, Mr. Sorrell. (TR 19) . . .

MR. SORRELL: Judge, I conferred with Mr. Jovanovic and it makes no difference to the plea.

THE COURT: You know what we are talking about here, Mr. Jovanovic?

DEFENDANT JOVANOVIC: Yes. (TR 19)

The same fifteen versus twenty year confusion ws echoed in the indictment itself. "LSD" was described as a Schedule I narcotic drug in the indictment. "LSD" is not in fact a Schedule I narcotic drug. If the substance involved had been a Schedule I narcotic in excess of five (5) grams, the maximum possible sentence would have been fifteen years. If the substance were in fact "LSD" the maximum possible sentence for distribution in excess of five (5) grams was a twenty year sentence per count.

At the conclusion of the Rule 11 hearing, the District Court accepted petitioner's guilty pleas to all three (3) counts. On September 23, 1986, petitioner was sentenced. Petitioner received a sentence of nine (9) years under Count I, nine (9) years under Count VIII, to be followed by special parole term of (3) years, ten (10) years under Count X, execution of judgment

was suspended and defendant placed on probation for five (5) years to be consecutive with the special parole term.

On October 22, 1986, petitioner's attorney withdrew and subsequently on December 2, 1986, new attorney entered appearance for petitioner. The District Court requested memoranda on the mistake in the indictment regarding the reference to "LSD" as being a Schedule I narcotic drug. Petitioner's Memorandum suggested to the District Court that the ambiguity in the indictment went to the voluntariness of the guilty plea.

On January 12, 1987, the District Court entered its Judgment and Committment Order. On January 22, 1987, petitioner filed a Notice of Appeal to the Court of Appeals for the Eighth Circuit. Petitioner urged on appeal that the plea was fundamentally involuntary as the District Court had failed to comply neither with the substance nor specific requirements of Rule 11.

In briefing and argument, the United States conceded that Count VIII did not involve distribution in excess of five (5) grams as charged in the indictment, and as plead to by petitioner.

On July 29, 1987, the three (3) Judge panel of the Court of Appeals for the Eighth Circuit affirmed the District Court's Judgment. The opinion of the Eighth Circuit panel noted that the District Court incorrectly stated the possible maximum special parole term. The Court considered this error to be harmless.

The Eighth Circuit further considered the statement of fifty-five (55) years as maximum aggregate term of imprisonment to be a correct statement given the Government's concession that Count VIII did not involve distribution in excess of five (5) grams. Count VIII of the indictment was not amended to reflect the lesser amount of the substance.

The Eighth Circuit opinion did not address or consider any other issues which had been raised in petitioner's Briefs. On August 12, 1987, petitioner filed a Petition for Rehearing En Banc, or Alternatively by Panel. Petitioner's Petition for Rehearing raised the failure of the panel's opinion to address or consider the other issues which had been raised on appeal. The Eighth Circuit denied the Petition for Rehearing on September 24, 1987.

REASONS FOR GRANTING WRIT

I. The Decision Of The Eighth Circuit And Its Sister Circuits Is In Conflict With The Legislative Intent Behind Rule 11(h); Is In Conflict With This Court's Holding In *McCarthy*, And Encourages Increasingly Careless Plea Hearings.

The Eighth opinion as it now stands, can only serve to undermine the very purposes behind Rule 11 by encouraging a more careless approach by District Judges in accepting a guilty plea. This is clearly in conflict with both this Court's opinion in *McCarthy v. United States,* and the expressed intent of the Advisory Committee in adopting Subsection (h) to Rule 11. This Court in *McCarthy* indicated the fundamental purposes of Rule 11 where to:

1. Assist the District Judge in making the Constitutionally required determination that the defendant's guilty plea is truly voluntary; and

2. Producing a complete record at the time the plea is entered of the factors relevant to the determination of the voluntariness of the plea. *McCarthy v. United States,* 394 U.S. 459, 465 (1969).

The Advisory Committee in adopting Subsection (h) to Rule 11 noted:

> The second cautionary note is that Subdivision (h) should not be read as an invitation to trial judges to take a more casual approach to Rule 11 proceedings. It is still true, as the Supreme Court pointed in *McCarthy,* that thoughtful and careful compliance with Rule 11 best serves the cause of fair and efficient administration of criminal justice, as it
>
> "will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate. It is

> therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the actions they are taking." (quoting *McCarthy*).
>
> Subdivision (h) makes no change in the responsibilities of the judge at Rule 11 proceedings, but instead merely rejects the extreme sanction of automatic reversal.

Fed. R. Crim. P. 11(h) Advisory Committee's Note, 1983 Amendment.

Notwithstanding the clear expression of contrary intent, the language of Subdivision (h) if broadly interpreted would affect a repeal by implication of the Rule. Subsection (h) indicates that any variance from the procedures required by the Rule, which do not affect substantial rights shall be disregarded. Fed. R. Crim. P. 11(h), 18 U.S.C. It could be argued from the language of the Rule, that the Court only need comply with Subsection (f), which requires that the Court establish a factual basis for the plea, as only Subsection (f) relates to "substantive rights". Fed. R. Crim. P. 11, 18 U.S.C. The panoply of requirements in Rule 11 are essentially of a procedural rather than substantive nature.

At first blush, such a broad interpretation of Rule 11(h) would seem to be hyperbole, however, a survey of the opinions of the various Circuits which have interpreted Subsection (h), indicates that this is the *de facto* position which the Circuit Courts have adopted.

THIRD CIRCUIT - The failure to require a notice on the record of a plea agreement was seen as harmless error. *U.S. v. DeLe-Puente,* 755 F. 2d 313, 315 (1985). The failure to inform the defendant of the possibility of restitution was considered to be harmless. *U.S. v. Hawthorne,* 806 F.2d 493, 498 (1986). **FOURTH CIRCUIT** - Failure to advise of possible restitution

was seen as harmless. *U.S. v. Fentress,* 792 F.2d 461, 465-466 (1986). **FIFTH CIRCUIT** - The failure of the District Court to inform defendant of his right to confront witnesses was viewed as harmless error. *U.S. v. Guichard,* 779 F.2d 1139, 1142 (1986). **SIXTH CIRCUIT** - The failure of the Trial Court to advise the defendant of his right to confront and cross examine witnesses and his right to be free from self-incrimination was seen as harmless error. *U.S. v. Stead,* 746 F.2d 355, 356 (1984). **NINTH CIRCUIT** - The District Judge's failure to advise of the maximum and minimum possible sentences was viewed as harmless. *U.S. v. Kearney,* 750 F.2d 787, 790 (1984). **ELEVENTH CIRCUIT** - Misleading the defendant as to his ability to withdraw a guilty plea was seen as harmless error. *Lilly v. U.S.,* 792 F.2d 1541, 1544 (1986).

Significantly, cases wherein Rule 11(h) was interpreted and error was found to be harmful, involved a failure to comply with Subsection (f). *U.S. v. Kramer,* 781 F.2d 1380, 1386 (9th Cir. 1986); *U.S. v. Van Buren,* 804 F.2d 888, 891 (6th Cir. 1986). *U.S. v. Corbett,* decided by the Fifth Circuit, involved a failure of the District Judge to either read the indictment or advise the defendant of the information in the indictment; this ommission was seen as harmful. *U.S. v. Corbett,* 742 F.2d 173, 178 (5th Cir. 1984).

Contrary to the intent behind the adoption of Rule 11(h), the Circuits have embarked on a course of interpretation wherein only violations of Subsection (f) are likely to be seen as harmful. Given the burdened docket of many District Courts, it can only encourage the District Judges to shortcut the procedures which do not relate to establishing a factual basis for the plea. Such a tendency would surely undermine the fundamental purposes behind the Rule itself.

The pattern of interpretation being applied by the Circuits clearly is one of finding the error to be harmful only when the factual basis of the plea and/or informing the defendant of the elements of the indictment are omitted.

II. The Decision Of The Eighth Circuit Is In Conflict With The Ninth Circuit Holding In *U.S. v. Sharon.*

The only aberation to this pattern appears to be *U.S. v. Sharon,* which is in direct conflict with the Eighth Circuit's holding in the present case. *U.S. v. Sharon,* 812 F.2d 1233 (9th Cir. 1987). The Court in *Sharon,* found a failure to inform defendant of a maximum special parole term to be harmful error and reversed. *Sharon, supra.* The Eighth Circuit determined that the District Court had misinformed petitioner herein as to the maximum possible special parole term. *U.S. v. McGeehan, et al.,* 824 F.2d 677 (1987). The Eighth Circuit found this to be harmless error. *Id.*

III. The Merging Of Standards For Review Of Collateral Attacks An Direct Appeals Conflicts The Legislative Intent Of Rule 11(h) And Undermines The Very Purposes Of Rule 11.

The Circuits' interpretation of the scope of Rule 11(h) is swiftly obliterating any distinction between a collateral attack of a plea and a direct appeal from a plea. The Sixth and Fifth Circuits' have been the most loqucious in their discussion of the scope of Subsection (h). The Sixth Circuit has essentially indicated that the same standard is applied in regard to a direct appeal from a guilty plea as would be applied on a Petition for Habeas Corpus. *U.S. v. Stead,* 746 F.2d 355, 357 (1984). The Fifth Circuit has indicated that only an entire failure to address a core element is harmful and that an inadequate address of a core element would be harmless. *U.S. v. Corbett,* 742 F.2d 173, 178 (1984); *U.S. v. Guichard,* 779 F.2d 1139, 1143 (1986). The Eighth Circuit in the present case based its decision largely on *Timmreck. Timmreck* had been based on a distinction between a collateral attack and direct appeal. *U.S. v. Timmreck,* 441 U.S. 780, 784 (1978).

The Advisory Committee clearly indicated that the "interest in finality of guilty pleas described in *Timmreck* is of somewhat

lesser weight when a direct appeal is involved". Fed. R. Crim. P. 11 (h) Advisory Committee's Note, 1983 Amendment, p.362. The distinction between a collateral attack and a direct appeal from a guilty plea is indeed a significant one which dovetails into the very purposes behind Rule 11.

Care in accepting a guilty plea is ultimately the underlying concept of Rule 11. Care in reviewing the record of a Rule 11 hearing must be the rule of the Appellate Courts. It is suggested that Subsection (h) of Rule 11 should not be construed so as to encourage *less* careful Rule 11 hearings *and* the consequent records thereof. Determinative records dissuade frivolous collateral attacks on a judgment. Determinative records facilitate a more summary disposition on the merits of such collateral attacks. Cf. *U.S. v. Raetzsch,* 781 F.2d 1149 (5th Cir. 1986). The accretion of time can become prejudicial to the merits of either parties case. Hearings which generate determinative records-those which clearly demonstrate substantial compliance with the core elements of voluntariness-are prejudicial to *no one.* Trial Courts should be encouraged to conduct hearings which leave a clear record of careful determination of voluntariness. Cf. *McCarthy, supra.*

On a direct appeal from a guilty plea, the burden is on the Government to demonstrate from the record the voluntariness of the plea. *McCarthy, supra,* at 469. Neither by its specific terms, nor by its implication does Subsection (h) of Rule 11 indicate that this burden has been shifted. The question of whether the record left by the plea hearing clearly shows that the plea was fundamentally voluntary is the essential consideration of the Rule.

It is suggested to this Court that the record left by petitioner's plea hearing raises more questions concerning the voluntariness of the plea, then it puts to rest. Certainly, the District Judge made no more than a perfunctory inquiry into the suspicious circumstances surrounding petitioner's plea. The District Court

further engaged in a admittedly confusing exchange regarding the maximum possible sentence. The Judge first indicated that the difference between a fifteen and twenty year sentence was an important one to the petitioner. A few minutes later, he suggested to the petitioner that it was not an important distinction.

In reviewing the record of this proceeding the Eighth Circuit has narrowly focused on the technical violations revealed in the transcript of the plea.

The judgment of the Eighth Circuit in confirming petitioner's plea, therefore sets a precedent which threatens to swallow whole the very purpose behind the Rule itself. If District Judges, even on direct appeal, will not be reversed unless the factual basis of the plea is involved or the Judges failure to address other procedural rights is egregious and total, then, surely a District Judge burdened by a heavy docket can only be encouraged to shortcut the procedural safeguards envisioned by Rule 11. It cannot be suggested that such a tendency would encourage the fulfillment of the essential purpose of Rule 11. It is essential that this Court consider these matters and protect the essential purposes of the Rule.

CONCLUSION

For these reasons, Petitioner respectfully prays that this Court issue a Writ of Certiorari to the United States Court of Appeals to the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

1. Opinion of United States Court of Appeals for the Eighth Circuit (Slip Form)
2. Judgment of United States Court of Appeals for the Eighth Circuit
3. Denial of Petition for Rehearing, United States Court of Appeals for the Eighth Circuit
4. Judgment and Order of Commitment from the District Court of the Eastern District of Missouri, Eastern Division
5. Rule 11

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2202

United States of America,
Appellee,

v.

Kipp Michael McGeehan,
Appellant.

No. 87-1114

United States of America,
Appellee,

v.

Timothy Steven Jovanovic,
Appellant.

Appeals from the United States
District Court for the
Eastern District of Missouri.

Submitted: June 11, 1987
Filed: July 29, 1987

Before ARNOLD, Circuit Judge, HENLEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

HENLEY, Senior Circuit Judge.

Defendant Timothy Steven Jovanovic pleaded guilty to two counts of distributing lysergic acid diethylamide (LSD) in violation of 21 U.S.C. §841 (a)(1) and one count of conspiracy to distribute LSD. 21 U.S.C. §846. Jovanovic now seeks to withdraw his plea, claiming the district court did not properly advise him of the consequences of his plea. *See* Fed R. Crim. P. 11 (c)(1).

Defendant Kipp Michael McGeehan was indicted on two counts of distributing LSD and one count of conspiracy to distribute LSD. Following a jury trial McGeehan was acquitted of the conspiracy count, but convicted on the two distribution counts. On appeal McGeehan raises two claims of error: (1) the government failed to prove an element of the distributing counts charged in the indictment; and (2) the evidence established that he was entrapped as a matter of law.

I. JOVANOVIC'S GUILTY PLEA

Jovanovic was charged in the indictment with two counts of distributing LSD together with one count of conspiracy. Both counts alleged each distribution to be in excess of five grams and a violation of 21 U.S.C. §841(a)(1). The first count alleged the distribution involved approximately 1,000 dosage units of LSD while the second count alleged approximately 5,000 dosage units. Section 841 is divided into two parts: unlawful acts and penalties. Under the first portion of §841 it is a crime to "knowingly or intentionally . . . distribute . . . a controlled substance . . ." §841(a)(1). LSD is a Schedule I controlled substance. 21 U.S.C. §812(c), Schedule I (c)(9).[1]

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[1] Jovanovic contends that the reference in the indictment to LSD being "a Schedule I *narcotic* controlled substance" (emphasis supplied) was misleading. LSD is not by definition a "narcotic drug." 21 U.S.C. §802(17). This mischaracterization is irrelevant in light of the definitive allegation of the drug involved as "lysergic acid diethylamide ("LSD")."

The penalty provisions of §841 are complex and have been subject to numerous legislative revisions. The range of penalties available turns on several factors: the controlled substance involved, the amount of the substance, and any prior conviction for an offense punishable under §841. The only factor relevant to this appeal is the amount of the controlled substance. If Jovanovic distributed five grams or more of LSD he could be sentenced to not more than twenty years imprisonment and/or a fine of not more than $250,000.00. §841(b)(1)(A) (Supp. III 1982). For an offense involving less than five grams of LSD the maximum penalty is not more than fifteen years imprisonment and/or a fine of not more than $125,000.00 together with a mandatory special parole term of at least three years. §841(b)(1)(B) (Supp. III 1982). The conspiracy statute adopted the maximum penalties provided for in the underlying offense. §846. Accordingly, if convicted, Jovanovic faced a maximum penalty of sixty years imprisonment and $750,000.00 in fines.

On June 1, 1986 Jovanovic was arraigned and pleaded not guilty to the three counts against him. He was released on bond. On Friday, August 15, 1986 the district court revoked Jovanovic's bond and ordered him confined pending trial because he violated the conditions of his release by using controlled substances during his release. During the weekend Jovanovic decided to change his plea to guilty. The following Monday Jovanovic appeared in court to enter his plea. Jovanovic now contends that the district court incorrectly informed him of the maximum possible penalty and he should therefore be allowed to plead anew.

In order to understand precisely what transpired, a lengthy reference to the change of plea colloquy is necessary.

> THE COURT: . . . With regard to Count I [conspiracy] . . . [do] you understand on Count I, I can fine . . . you up to $250,000 and order . . . you to spend up to 20 years in jail, or [both] . . .?

JOVANOVIC: Yes.

. . . .

THE COURT: With regards to Counts VIII and X [distribution counts] do you understand that I can fine up up to $250,000 on each of those counts and I can likewise incarcerate you for up to 20 years on each of those counts, plus a 3 year minimum special parole term . . .?

JOVANOVIC: Yes, sir.

. . . .

THE COURT: So that the jail term on Jovanovic, the maximum — I am sure you have added it a few times — is what, 60 years?

DEFENSE ATTORNEY: Yes, sir.

THE COURT: Three years special parole term minimum and $750,000 in fines, is that right . . .?

U.S. ATTORNEY: I get 50, Your Honor.

THE COURT: 50 what?

U.S. ATTORNEY: 50 years. 15 and 15 plus 30 and plus 20.

. . . .

THE COURT: VIII and IX, at least down here they got 20 years.

DEFENSE ATTORNEY: It should be 15.

U.S. ATTORNEY: That's an error. I should be 15.

THE COURT: That's an error and it's an important error. So we have a total possible for Mr. Jovanovic of 50 years, it that right, Mr. Jovanovic?

JOVANOVIC: Yes, sir.

THE COURT: The fine we talked about is $750,000 and 3 year minimum special parole term . . .?

DEFENSE ATTORNEY: That's correct.

THE COURT: Mr. [U.S. Attorney]?

U.S. ATTORNEY: That's correct.

THE COURT: And Mr. Jovanovic?

JOVANOVIC: Yes.

U.S. ATTORNEY: Your Honor, let me correct that. With regard to the 5000 count, Count X, which is a 5000 dosage unit, I believe that calls for 20 years.

There is an enhanced penalty based upon the number of grams.

. . . .

THE COURT: So X is different from VIII?

U.S. ATTORNEY: I believe it is . . .

. . . .

U.S. ATTORNEY: Judge . . . Roman Numeral IV is the enhanced penalty provision with regard to LSD, based n the number of grams.

Should a defendant be convicted of 5 grams or more, possession or distribution, the enhanced penalty is 20 years instead of 15. We have that situation here with regard to Count X.

. . . .

THE COURT: So you are saying instead of a total for Mr. Jovanovic would be 55 years, not 50 years?

U.S. ATTORNEY: That's right.

[At this point the district court directs the defendant's attorney to discuss with Mr. Jovanovic what had transpired to determine if it would affect his decision to plead guilty.]

DEFENSE ATTORNEY: Judge, I conferred with Mr. Jovanovic and it makes no difference to the plea.

THE COURT: You know what we are talking about here, Mr. Jovanovic?

JOVANOVIC: Yes.

THE COURT: It's a total . . . [of] 55 years jail time that can conceivably be assessed by me against you under the statutes that apply to your plea here today, you know that you want to go ahead, do you?

JOVANOVIC: Yes, sir.

Undoubtedly, this exchange regarding the maximum allowable sentence is confusing. Ultimately, a maximum term of imprisonment of 55 years is arrived at because the United States conceded that only of of the distribution counts is subject to an enhanced penalty.[2] Thus, the district court ultimately advised Jovanovic correctly of the maximum available prison term.

At the outset the district court advised Jovanovic that he was also subject to a mandatory minimum three year special parole term. This was incorrect. Under the enhanced penalty provision Jovanovic was not subject to special parole. 21 U.S.C. §841(b)(1)(A) (Supp. III 1982). However, upon the government's concession that Count VIII did not involve in excess of five grams as charged in the indictment, Jovanovic became subject to a mandatory three year minimum special parole term under the lesser included offense of distribution of less than five grams. §841(b)(1)(B) (Supp. III 1982). We note, however, that

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[2] Simple possession of LSD (*i.e.*, less than 5 grams) is a lesser included offense when distribution of 5 or more grams is charged. (*See United States v. Alvarez*, 735 F.2d 4671, 466-67 (11th Cir. 1984); *see also United States v. Barket*, 530 F.2d 181, 187 (8th Cir. 1975), *cert. denied*, 429 U.S. 917 (1976) ("One offense is a lesser included offense of another only if, in order to commit the greater offense, it is necessary to commit the lesser."). A lesser included offense need not be charged in an indictment, as it is already included in the offense charged. *United States v. Martel*, 792 F.2d 630, 638 (7th Cir. 1986).

the district court did not inform Jovanovic that the special parole term could be a life term.

"Before accepting a plea of guilty . . . the court must . . . inform the defendant of, and determine that the defendant understands . . . the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term . . ." Fed. R. Crim. P. 11(c). Formerly, the requirements of Rule 11 were to be strictly adhered to and any deviation therefrom would require reversal and remand to allow the defendant to plead anew. McCarthy v. United States, 394 U.S. 459, 472 (1969). Subsequently, the Supreme Court concluded that a failure to strictly comply with Rule 11 would not warrant habeas relief unless it results in a complete miscarriage of justice or is inconsistent with the rudimentary demands of fair procedure. *United Staes v. Timmreck,* 441 U.S. 780, 784 (1979). Thus, *Timmreck* tends to undercut the proposition underlying the automatic reversal rule of *McCarthy* "that prejudice inheres in a failure to comply with Rule 11 . . ." *McCarthy,* 394 U.S. at 471. *See* Comment, *Rule 11 of the Federal Rules of Criminal Procedure: A New "Strict in Context" Approach,* 22 B.C.L. Rev. 815, 834 n.140 (1981). Therefore, it was arguable that some deviations from Rule 11 may be merely harmless error. *See United States v. Dayton,* 604 F.2d 931, 939-40 (5th Cir. 1979).

In 1983 Rule 11 was amended to include a harmless error provision:

> **Harmless Error.** Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

Fed. R. Crim. P. 11(h). This amendment has been criticized for failing to adequately define harmless error. Comment, *supra,* 22 B.C.L. Rev. at 841-42. It is not unusual, however, for the task of refining and giving meaning to a broad standard to be left to the courts. In any event, to resolve the question of

whether the error here was harmless we need to look no farther than the Advisory Committee's Notes. It is harmless error "where the judge's compliance with subdivision (c)(2)[sic] was erroneous in part in that the judge understated the maximum penalty somewhat, but the penalty actually imposed did not exceed that indicated in the warnings . . ." Fed. R. Crim. P. 11(h) Advisory Committee's note, 1938 amendment. The sentence actually imposed on Jovanovic did not exceed the varying amount he was told he could receive.[3] Accordingly, any error was harmless.

II. KIPP MICHAEL McGEEHAN

Defendant McGeehan was indicted on the same three counts as Jovanovic. McGeehan entered a plea of innocent to all three counts and a jury trial was held. At the close of the government's evidence McGeehan filed a written motion for acquittal alleging that the evidence was insufficient to support a conviction. McGeehan argues that the government failed to prove he distributed five or more grams of LSD. The government's evidence regarding the amount of LSD involved in Count VIII (1,000 dosage units) was that the gross weight was 2.25 grams and the net weight was 0.018 grams.[4] For Count X (5,000

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[3] Essentially, the primary problem was the flucuation in the maximum available prison sentence from 50 to 60 years. Jovanovic was ultimtely sentenced to two concurrent nine-year terms of imprisonment, followed by a three-year special parole term, followed by a five-year probation term and a ten-year suspended sentence of imprisonment.

[4] By net weight we mean the actual amount of LSD. Gross weight refers to the LSD plus the carrier medium. LSD is ingested in extremely small quantities. Accordingly, LSD is commonly adhered to a plastic or gelatin "carrier" which allows the LSD to be divided into the minute quantities of a single dosage unit.

dosage units) the gross weight of LSD plus carrier was 16.37 grams, the net weight of LSD was 0.195 grams.[5]

The district court denied McGeehan's motion for acquittal and concluded that the amount of LSD involved was an issue to be determined at sentencing and was not an element of the offense to be determined by the jury. Accordingly, the jury was instructed that it only had to find that a measurable amount of LSD was involved. Defendant did not object to this instruction. Indeed, he requested an amended instruction that stated "the actual amount need not be proved." The jury acquitted McGeehan on the conspiracy charge but convicted him on the two distribution counts.

At sentencing the district court made no finding regarding the amount of LSD. McGeehan was sentenced to five years imprisonment on Count VIII and ten years of imprisonment (execution suspended) and five years probation on Count X. No special parole term was imposed. *See* 21 U.S.C. §841(b)(1)(B) (Supp. III 1982) (mandatory three-year special parole term if less than five grams of LSD is involved). McGeehan argues that the evidence failed to show he distributed five grams or more of LSD. The government contends that the weight of the carrier must also be included and the combined weight did exceed five grams.[6]

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[5] On cross-examination the government's expert testified that the weight of LSD involved was 0.595 grams. The difference appears to result from a math error. The expert testified that the single dosage strength of LSD in this sample was 39 micrograms (0.000039 grams). Thus, the total LSD is determined by multiplying the dosage strength by the number of doses in the sample (*i.e.*, 0.000039 g./dose x 5,000 doses). The result is 0.195 grams. For the purpose of this opinion the difference between 0.595 grams and 0.195 grams is irrelevant.

[6] Even under the government's theory the total weight did not exceed five grams in Count VIII.

The statute under which McGeehan was sentenced plainly states "5 grams or more of lysergic acid diethylamide (LSD) . . ." 21 U.S.C. §841(b)(1)(A)(iv) (Supp. III 1982). This suggests that only the weight of the LSD is to be considered. This conclusion is further buttressed by the current version of this section which reads, "10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD) . . ." §841(b)(1)(A)(v). This subsequent amendment demonstrates that Congress was aware of the difference between LSD and LSD combined with a carrier substance. Finally, the legislative history demonstrates that the reference to five grams meant only the LSD, not the combined weight.

> Under paragraph (b)(1), the most serious penalties under this section . . . apply when the controlled substance involved in the offense is listed under Schedules I or II and is a kilogram or more of a narcotic drug other than an opiate or is 500 grams or more of phencyclidine (PCP) or 5 grams or more of lysergic acid diethylamide (LSD). This grading makes appropriate distinctions between large and casual traffickers — drawing the dividing line with respect to cocaine, PCP, and LSD at approximately *100,000 times the average user dosage* . . .

S. Rep. No. 307, 97th Cong., 1st Sess. 868 (1981) (cited with approval S. Rep. No. 225, 98th Cong., 2d Sess., 255 n.1, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3437 n.1) (emphasis supplied). The enhanced sentencing provisions of §841 were plainly not intended to reach a distributor of 1,000 or even 5,000 dosage units of LSD. Accordingly, because it appears that McGeehan was sentenced under §841(b)(1)(A) rather than §841(b)(1)(B), we vacate the sentence imposed on both counts and remand for resentencing. *See Alvarez*, 735 F.2d at 467-68 (where defendant is improperly sentenced under an enhanced penalty provision based on the amount of controlled substance

involved, remand for resentencing under the proper provision is appropriate).[7]

McGeehan also contends that he was entrapped as a matter of law and the district court erred in not ordering an acquittal. We have carefully reviewed the record and conclude that the issue of entrapment included disputed issues of fact and inferences to be drawn from those facts and was properly left to the jury.

The convictions of defendant Jovanovic are, in all respects, affirmed. The convictions of defendant McGeehan are affirmed; however, the sentence imposed is vacated and the matter remanded to the district court for resentencing.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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[7] In present circumstances, we need not address the question whether the amount of LSD is an element of the offense to be determined by the jury, or an issue for the district court at sentencing. *See Mullaney v. Wilbut*, 421 U.S. 684, 696-701 (1974); *United States v. Gibbs*, 813 F.2d 596, 602-03 (3d Cir. 1987) (2-1); *id.* at 603-07 (Aldisert, J., dissenting) (discussion of both sides of this issue).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-1114EM

United States of America,
Appellee,

v.

Timothy Steven Jovanovic,
Appellant.

Appeal from the United States
District Court for the
Eastern District of Missouri

JUDGMENT

(Filed October 6, 1987)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

July 29, 1987

A True Copy.

ATTEST: Robert D. St. Vrain,
Clerk, U.S. Court of Appeals, 8th Circuit

MANDATE ISSUED: October 5, 1987

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-1114EM

United States of America,
Appellee,

v.

Timothy Steven Jovanovic,
Appellant.

Appeal from the United States
District Court for the
Eastern District of Missouri

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

September 24, 1987

Order entered at the direction of the Court.

Robert D. St. Vrain
Clerk, U.S. Court of Appeals, 8th Circuit

UNITED STATES DISTRICT COURT FOR
EASTERN DISTRICT OF MISSOURI

No. 86-144Cr (1)

Defendant: TIMOTHY STEVEN JOVANOVIC

JUDGMENT AND PROBATION/COMMITMENT ORDER

September 2, 1986

(Filed: January 12, 1987

COUNSEL: William E. Sorrell

PLEA: GUILTY as to Counts 1, 8 and 10 of the Indictment

FINDING & JUDGMENT: did willfully and knowingly conspire, combine, confederate and agree with others to commit offenses against the United States to possess with intent to distribute, and to distribute lysergic acid diethylamide ("LSD"), a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), and in furtherance of said conspiracy, committed certain overt acts,

In violation of Title 21, United States Code, Section 846, as charged in Count 1 of the Indictment; and knowingly and intentionally distributed approximately 1000 dosage units of lysergic acid diethylamide ("LSD"), a Schedule I controlled substance,

In violation of Title 21, United States Code, Section 841(a)(1), as charged in Count 8 of the Indictment; and

knowingly and intentionally distributed approximately 5000 dosage units of lysergic acid diethylamide ("LSD"), a Schedule I controlled substance,

In violation of Title 21, United States Code, Section 841(a)(1), as charged in Count 10 of the Indictment.

SENTENCE OR PROBATION ORDER: NINE (9) years as to and under the charge contained in Count 1 of the Indictment.

It Is Further Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of NINE (9) years as to and under the charge contained in Count 8 of the Indictment, and shall be followed by a special parole term of THREE (3) years, said term of imprisonment to run concurrently with the term of imprisonment imposed under Count 1.

SPECIAL CONDITIONS OF PROBATION: It Is Further Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) years as to and under the charge contained in Count 10 of the Indictment, the execution of the judgment is hereby suspended and the defendant is placed on probation for a period of FIVE (5) years in accordance with the conditions of probation this day filed and shall follow and be consecutive to the special parole term and any subsequent parole or supervised time relating to Counts 1 and 8 of the Indictment, making an aggregate term of imprisonment of NINE (9) years, THREE (3) years special parole term and FIVE (5) years probation.

Defendant is given a special assessment of $50.00 under each of Counts 1, 8 and 10 of the Indictment, making a total assessment of $150.00 under the Comprehensive Crime Control Act of 1984.

Defendant is remanded to the U.S. Marshal.

Rule 11. Pleas

(Alternatives.

(1) In General. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) Conditional Pleas. With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every state of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if his plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which he has pleaded, that his answers may later be used against him in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement.—If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be

less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

> **(A)** a plea of guilty which was later withdrawn;
>
> **(B)** a plea of nolo contendere;
>
> **(C)** any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or
>
> **(D)** any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty, or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judg-

ment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

(As amended Feb. 28, 1966, eff. July 1, 1986; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, §3(5)-(10), 89 Stat. 371, 372; Apr. 30, 1979, eff. Aug. 1, 1979, and Dec. 1, 1980; Apr. 28, 1982, eff. Aug. 1, 1982; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 1985, eff. Aug. 1, 1985.)

Notes of Advisory Committee on Rules

1. This rule is substantially a restatement of existing law and practice, 18 U.S.C. §564 (Standing mute); Fogus v. United States, 34 F.2d 97, C.C.A.4th, (duty of court to ascertain that plea of guilty is intelligently and voluntarily made).

2. The plea of nolo contendere has always existed in the Federal courts. Hudson v. United States, 47 S.Ct. 127, 272, U.S. 451, 71 L.Ed. 347; United States v. Norris, 50 S.Ct. 424, 281 U.S. 619, 74 L.Ed. 1076. The use of the plea is recognized by the Probation Act, 18 U.S.C. 724. While at times criticized as theoretically lacking in logical basis, experience has shown that it performs a useful function from a practical standpoint.

1966 Amendment

The great majority of all defendants against whom indictments or informations are filed in the federal courts plead guilty. Only a comparatively small number go to trial. See United

States Attorneys Statistical Report, Fiscal Year 1964, p. 1. The fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all in the federal courts.

Three changes are made in the second sentence. The first change makes it clear that before accepting either a plea of guilty or nolo contendere the court must determine that the plea is made voluntarily with understanding of the nature of the charge. The second change expressly requires the court to address the defendant personally in the course of determining that the plea is made voluntarily and with understanding of the nature of the charge. The reported cases reflect some confusion over this matter. Compare United States v. Diggs, 304 F.2d 929 (6th Cir. 1962); Domenica v. United States, 292 F.2d 483 (1st Cir. 1961); Gundlach v. United States, 262 F.2d 72 (4th Cir. 1958), cert. den., 360 U.S. 904 (1959); and Julian v. United States, 236 F.2d 155 (6th Cir. 1956), which contain the implication that personal interrogation of the defendant is the better practice even when he is represented by counsel, with Meeks v. United States, 298 F.2d 204 (5th Cir. 1962); Nunley v. United States, 294 F.2d 579 (10th Cir. 1961), cert. den., 368 U.S. 991 (1962); and United States v. Von der Heide, 169 F.Supp. 560 (D.D.C. 1959)

The third change in the second sentence adds the words "and the consequences of his plea" to state what clearly is the law. See, e.g., Von Moltke v. Gillies, 332 U.S. 708, 724 (1948); Kerchevel v. United States, 272 U.S. 220, 223 (1927); Munich v. United States, 337 F.2d 356 (9th Cir. 1964); Pilkington v. United States, 315 F.2d 204 (4th Cir. 1963); Smith v. United States, 324 F.2d 436 (D.C. Cir. 1963); but cf. Marvel v. United States 35 F.2d 101 (5th Cir. 1964).

A new sentence is added at the end of the rule to impose a duty on the court in cases where the defendant pleads guilty to satisfy itself that there is a factual basis for the plea before entering judgment. The court should satisfy itself, by inquiry of

the defendant or the attorney for the government, or by examining the presentence report, or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. Such inquiry should, e.g., protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge. For a similar requirement see Mich.Stat.Ann. §28.1058 (1954); Mich.Sup.Ct.Rule 35A; In re Valle, 364 Mich. 471, 110 N.W.2d 673 (1961); People v. Barrows, 358 Mich. 267, 99 N.W.2d 347 (1959); People v. Bumpus, 355 Mich. 374, 94 N.W.2d 854 (1959); People v. Coates, 337 Mich. 56, 59 N.W.2d 83 (1953). See also Stinson v. United States, 316 F.2d 554 (5th Cir. 1963). The normal consequence of a determination that there is not a factual basis for the plea would be for the court to set aside the plea and enter a plea of not guilty.

For a variety of reasons, it is desirable in some cases to permit entry of judgment upon a plea of nolo contendere without inquiry into the factual basis for the plea. The new third sentence is not, therefore, made applicable to pleas of nolo contendere. It is not intended by this omission to reflect any view upon the effect of a plea of nolo contendere in relation to a plea of guilty. That problem has been dealt with by the courts. See e.g., Lott v. United States, 367 U.S 421 (1961).

1974 Amendment

The amendments to rule 11 are designed to achieve two principal objectives:

(1) Subdivision (c) prescribes the advice which the court must give to insure that the defendant who pleads guilty has made an informed plea.

(2) Subdivision (e) provides a plea agreement procedure designed to give recognition to the propriety of plea discussions;

to bring the existence of a plea agreement out into the open in court; and to provide methods for court acceptance or rejection of a plea agreement.

Other less basic changes are also made. The changes are discussed in the order in which they appear in the rule.

Subdivision (b) retains the requirement that the defendant obtain the consent of the court in order to plead nolo contendere. It adds that the court shall, in deciding whether to accept the plea, consider the view of the prosecution and of the defense and also the larger public interest in the administration of criminal justice.

Although the plea of nolo contendere has long existed in the federal courts, Hudson v. United States, 272 U.S. 451, 47 S.Ct. 127, 71 L.Ed. 347 (1926), the desirability of the plea has been a subject of disagreement. Compare Lane-Reticker, Nolo Contendere in North Carolina, 34 N.C.L.Rev. 280, 290-291 (1956), with Note, The Nature and Consequences of the Plea of Nolo Contendere, 33 Neb.L.Rev. 428, 434 (1954), favoring the plea. The American Bar Association Project on Standards for Criminal Justice takes the position that "the case for the nolo plea is not strong enough to justify a minimum standard supporting its use," but because of "use of the plea contributes in some degree to the avoidance of unnecessary trials" it does not proscribe the use of the plea. ABA, Standards Relating to Pleas of Guilty §1.1(a) Commentary at 16 (Approved Draft, 1968).

A plea of nolo contendere is, for purposes of punishment, the same as the plea of guilty. See discussion of the history of the nolo plea in North Carolina v. Alford, 400 U.S. 25, 35-36 n. 8, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Note, The Nature and Consequences of the Plea of Nolo Contendere, 33 Neb.L.Rev. 428, 430 (1954). A judgment upon the plea is a conviction and may be used to apply multiple offender statutes. Lenvin and Meyers, Nolo Contendere: Its Nature and Implications, 51 Yale L.J. 1255, 1265 (1942). Unlike a plea of guilty, however, it can-

not be used against a defendant as an admission in a subsequent criminal or civil case. 4 Wigmore §1066(4), at 58 (3d ed. 1940, Supp. 1970); Rules of Evidence for United States Courts and Magistrates, rule 803(22) (Nov. 1971). See Lenvin and Meyers, Nolo Contendere: Its Nature and Implications, 51 Yale L.J. 1255 w1942); ABA Standards Relating to Pleas of Guilty §§1.1(a) and (b), Commentary at 15-18 (Approved Draft, 1968).

The factors considered relevant by particular courts in determining whether to permit . . .

* * * *

price to pay for avoiding otherwise unnecessary trials.

As for the objection that conditional pleas conflict with the government's interest in achieving finality, it is likewise without force. While it is true that the conditional plea does not have the complete finality of the traditional plea of guilty or nolo contendere because "the essence of the agreement is that the legal guilt of the defendant exists only if the prosecution's case" survives on appeal, the plea

> continues to serve a partial state interest in finality, however, by establishing admission of the defendant's facutal guilt. The defendant stands guilty and the proceedings come to an end if the reserved issue is ultimately decided in the government's favor.

Comment, 26 U.C.L.A.L.Rev. 360, 378 (1978).

The claim that the lack of a full trial record precludes effective appellate review may on occasion be relevant. Cf. United States v. MacDonald, supra (holding interlocutory appeal not available for denial of defendant's pretrial motion to dismiss on speedy trial grounds, and noting that "most speedy trial claims * * * are best considered only after the relevant facts have been developed at trial"). However, most of the objections which would likely be raised by pretrial motion and preserved for ap-

pellate review by a conditional plea are subject to appellate resolution without a trial record. Certainly this is true as to the very common motion to suppress evidence, as is indicated by the fact that appellate courts presently decide such issues upon interlocutory appeal by the government.

With respect to the objection that conditional pleas circumvent application of the harmless error doctrine, it must be acknowledged that "[a]bsent a full trial record, containing all the government's evidence against the defendant, invocation of the harmless error rule is arguably impossible." Comment, supra, at 380. But, the harmless error standard with respect to constitutional objections is sufficiently high, see Chapman v. California, 386 U.S. 18 (1967), that relatively few appellate decisions result in affirmance upon that basis. This it will only rarely be true that the conditional plea device will cause an appellate court to consider constitutional questions which could otherwise have been avoided by invocation of the doctrine of harmless error.

To the extent that these or related objections would otherwise have some substance, they are overcome by the provision in Rule 11(a)(2) that the defendant may enter a conditional plea only "with the approval of the court and the consent of the government." (In this respect, the rule adopts the practice now found in the Second Circuit.) The requirement of approval by the court is most appropriate, as it ensures, for example, that the defendant is not allowed to take an appeal on a matter which can only be fully developed by proceeding to trial; cf. United States v. MacDonald, supra. As for consent by the government, it will ensure that conditional pleas will be allowed only when the decision of the court of appeals will dispose of the case either by allowing the plea to stand or by such action as compelling dismissal of the indictment or suppressing essential evidence. Absent such circumstances, the conditional plea might only serve to postpone the trial and require the government to try the case after substantial delay, during which time

witnesses may be lost, memories dimmed, and the offense grown so stale as to lose jury appeal. The government is in a unique position to determine whether the matter at issue would be case-dispositive, and, as a party to the litigation, should have an absolute right to refuse to consent to potentially prejudicial delay. Although it was suggested in United States vs. Moskow, supra, that the government should have no right to prevent the entry of a conditional plea because a defendant has no comparable right to block government appeal of a pretrial ruling pursuant to 18 U.S.C. §3731, that analogy is unconvincing. That statute requires the government to certify that the appeal is not taken for purposes of delay. Moreoever, where the pretrial ruling is case-dispositive, §3731 is the only mechanism by which the government can obtain appellate review, but a defendant may always obtain review by pleading not guilty.

Unlike the state statutes cited earlier, Rule 11(a)(2) is not limited to instances in which the pretrial ruling the defendant wishes to appeal was in response to defendant's motion to suppress evidence. Though it may be true that the conditional plea device will be most commonly employed as to such rulings, the objectives of the rule are well served by extending it to other pretrial rulings as well. See, e.g., ABA Standards, supra (declaring the New York provision "should be enlarged to include other pretrial defenses"); Uniform Rules of Criminal Procedure, rule 44(d) (Approved Draft, 1974) ("any pretrial motion which, if granted, would be dispositive of the case").

The requirement that the conditional plea be made by the defendant "reserving in writing the right to appeal from the adverse determination of any specified pretrial motion," though extending beyond the Second Circuit practice, will ensure careful attention to any conditional plea. It will document that a particular plea was in fact conditional, and will identify precisely what pretrial issues have been preserved for appellate review. By requiring this added step, it will be possible to avoid entry of a conditional plea without the considered acquiescence

of the government (see United States v. Burke, supra, holding that failure of the government to object to entry of a conditional plea constituted consent) and post-plea claims by the defendant that his plea should be deemed conditional merely because is occurred after denial of his pretrial motions (see United States v. Nooner, supra).

It must be emphasized that the only avenue of review of the specified pretrial ruling permitted under a rule 11(a)(2) conditional plea is an appeal, which must be brought in compliance with Fed.R.App.P. 4(b). Relief via 28 U.S.C. §2255 is not available for this purpose.

The Supreme Court has held that certain kinds of constitutional objections may be raised after a plea of guilty. Menna v. New York, 423 U.S. 61 (1975) (double jeopardy violation); Blackledge v. Perry, 417 U.S. 21 (1974) (due process violation by charge enhancement following defendant's exercise of right to trial de novo). Subdivision 11(a)(2) has no application to such situations, and should not be interpreted as either broadening or narrowing the Menna-Blackledge doctrine or as establishing procedures for its application.

Rule 11(h). Subdivision)h) makes clear that the harmless error rule of Rule 52(a) is applicable to Rule 11. The provision does not, however, attempt to define the meaning of "harmless error," which is left to the case law. Prior to the amendments which took effect on Dec. 1, 1975, Rule 11 was very brief; it consisted of but four sentences. The 1975 amendments increased significantly the procedures which must be undertaken when a defendant tenders a plea of guilty or nolo contendere, but this change was warranted by the "two principal objectives" then identified in the Advisory Committee Note: (1) ensuring that the defendant has made an informed plea; and (2) ensuring that plea agreements are brought out into the open in court. An inevitable consequence of the 1975 amendments was some increase in the risk that a trial judge, in a particular case, might in-

advertently deviate to some degree from the procedure which a very literal reading of Rule 11 would appear to require.

This being so, it became more apparent than ever that Rule 11 should not be given such a crabbed interpretation that ceremony was exalted over substance. As stated in United States v. Scarf, 551 F.2d 1124 (8th Cir.1977), concerning amended Rule 11: "It is a salutary rule, and district courts are required to act in substantial compliance with it although * * * ritualistic compliance is not required." As similarly pointed out in United States v. Saft, 558 F.2d 1073 (2d Cir.1977),

> the Rule does not say that compliance can be achieved only by reading the specified items in haec verba. Congress meant to strip district judges of freedom to decide what they must explain to a defendant who wishes to plead guilty, not to tell them precisely how to perform this important task in the great variety of cases that would come before them. While a judge who contents himself with literal application of the Rule will hardly be reversed, it cannot be supposed that Congress preferred this to a more meaningful explanation, provided that all the specified elements were covered.

Two important points logically flow from these sound observations. One concerns the matter of construing Rule 11: it is not to be read as requiring a litany or other ritual which can be carried out only by word-for-word adherence to a set "script." The other, specifically addressed in new subdivision (h), is that even when it may be concluded Rule 11 has not been complied with in all respects, it does not inevitably follow that the defendant's plea of guilty or nolo contendere is invalid and subject to being overturned by any remedial device then available to the defendant.

Notwithstanding the declaration in Rule 52(a) that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded," there has existed for

some years considerable disagreement concerning the applicability of the harmless error doctrine to Rule 11 violations. In large part, this is attributable to uncertainty as to the continued vitality and the reach of McCarthy v. United States, 394 U.S. 459 (1969). In McCarthy, involving a direct appeal from a plea of guilty because of noncompliance with Rule 11, the Court concluded

> that prejudice inheres in a failure to comply with rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards, which are designed to facilitate a more accurate determination of the voluntariness of his plea. Our holding [is] that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew * * *.

McCarthy has been most frequently relied upon in cases where, as in that case, the defendant sought relief because of a LRule 11 violation by the avenue of direct appeal. It has been held that in such circumstances a defendant's conviction must be reversed whenever the "district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11," United States v. Boone, 543 F.2d 1090 (4th Cir.1976), and that in this context any reliance by the government on the Rule 52(a) harmless error concept "must be rejected." United States v. Journet, 544 F.2d 633 (2d Cir.1976). On the other hand, decisions are to be found taking a harmless error approach on direct appeal where it appeared the nature and extent of the deviation from Rule 11 was such that it could not have had any impact on the defendant's decision to plead or the fairness in now holding him to his plea. United States v. Peters, No. 77-1700 (4th Cir., Dec. 22, 1978) (where judge failed to comply fully with Rule 11(c)(1), in that defendant not correctly advised of maximum years of special parole term but was told it is at least 3 years, and defendant thereafter sentenced to 15 years plus 3-year special parole term, government's motion for summary affirmance granted, as "the error was harmless"); United

States v. Coronado, 554 F.2d 166 (5th Cir.1977) (court first holds that charge of conspiracy requires some explanation of what conspiracy means to comply with Rule 11(c)(1), but then finds no reversible error "because the rule 11 proceeding on its face discloses, despite the trial court's failure sufficiently to make the required explication of the charges, that Coronado understood them").

But this conflict has not been limited to cases involving nothing more than a direct appeal following defendant's plea. For example, another type of case is that in which the defendant has based a post-sentence motion to withdraw his plea on a Rule 11 violation. Rule 32(d) says that such a motion may be granted "to correct manifest injustice," and some courts have relied upon this latter provision in holding that post-sentence plea withdrawal need not be permitted merely because Rule 11 was not fully complied with and that instead the district court should hold an evidentiary hearing to determine "whether manifest injustice will result if the conviction based on the guilty plea is permitted to stand." United States v. Scarf, 551 F.2d 1124 (8th Cir.1977). Others, however, have held that McCarthy applies and prevails over the language of Rule 32(d), so that "a failure to scrupulously comply with Rule 11 will invalidate a plea without a showing of manifest injustice." United States v. Cantor, 469 F.2d 435 (3d Cir.1972).

Disagreement has also existed in the context of collateral attack upon pleas pursuant to 28 U.S.C. § 2255. On the one hand, it has been concluded that "[n]ot every violation of Rule 11 requires that the plea be set aside" in a § 2255 proceeding, and that "a guilty plea will be set aside on collateral attack only where to not do so would result in a miscarriage of justice, or where there exists exceptional circumstances justifying such relief." Evers v. United States, 579 F.2d 71 (10th Cir.1978). The contrary view was that McCarthy governed in § 2255 proceedings because "the Supreme Court hinted at no exceptions to its policy of strict enforcement of Rule 11." Timmreck v.

United States, 577 F.2d 377 (6th Cir.1978). But a unanimous Supreme Court resolved this conflict in United States v. Timmreck, 441 U.S. 780 (1979), where the Court concluded that the reasoning of Hill v. United States, 368 U.S. 424 (1962) (ruling a collateral attack could not be predicated on a violation of Rule 32(a))

> is equally applicable to a formal violation of Rule 11. * * *
>
> Indeed, if anything, this case may be a stronger one for foreclosing collateral relief than the Hill case. For the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas.
>
> > "Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea."

This interest in finality is strongest in the collateral attack context the Court was dealing with in Timmreck, which explains why the Court there adopted the Hill requirement that in a § 2255 proceeding the rule violation must amount to "a fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure." The interest in finality of guilty pleas described in Timmreck is of somewhat lesser weight when a direct appeal is involved (so that the Hill standard is obviously inappropriate in that setting), but yet is sufficiently compelling to make unsound the proposition that reversal is re-

quired even where it is apparent that the Rule 11 violation was of the harmless error variety.

Though the McCarthy per se rule may have been justified at the time and in the circumstances which obtained when the plea in that case was taken, this is no longer the case. For one thing, it is important to recall that McCarthy dealt only with the much simpler pre-1975 version of Rule 11, which required only a brief procedure during which the chances of a minor, insignificant and inadvertent deviation were relatively slight. This means that the chances of a truly harmless error (which was not involved in McCarthy in any event, as the judge made no inquiry into the defendant's understanding of the nature of the charge, and the government had presented only the extreme argument that a court "could properly assume that petitioner was entering that plea with a complete understanding of the charge against him" merely from the fact he had stated he desired to plead guilty) are much greater under present Rule 11 than under the version before the Court in McCarthy. It also means that the more elaborate and lengthy procedures of present Rule 11, again as compared with the version applied in McCarthy, make it more apparent than ever that a guilty plea is not "a mere gesture, a temporary and meaningless formality reversible at the defendant's whim," but rather " 'a grave and solemn act,' which is 'accepted only with care and discernment.' " United States v. Barker, 514 f.2d 208 (D.C.Cir.1975), quoting from Brady v. United States, 397 U.S. 742 (1970). A plea of that character should not be overturned, even on direct appeal, when there has been a minor and technical violation of Rule 11 which amounts to harmless error.

Secondly, while McCarthy involved a situation in which the defendant's plea of guilty was before the court of appeals on direct appeal, the Supreme Court appears to have been primarily concerned with § 2255-type cases, for the Court referred exclusively to cases of that kind in the course of concluding that a per se rule was justified as to Rule 11 violations because of "the

difficulty of achieving [rule 11's] purposes through a post-conviction voluntariness hearing." But that reasoning has now been substantially undercut by United States v. Timmreck, supra, for the Court there concluded § 2255 relief "is not available when all that is shown is a failure to comply with the formal requirements of the Rule," at least absent "other aggravating circumstances," which presumably could often only be developed in the course of a later evidentiary hearing.

Although all of the aforementioned considerations support the policy expressed in new subdivision (h), the Advisory Committee does wish to emphasize two important cautionary notes. The first is that subdivision (h) should not be read as supporting extreme or speculative harmless error claims or as, in effect, nullifying important Rule 11 safeguards. There would not be harmless error under subdivision (h) where, for example, as in McCarthy, there had been absolutely no inquiry by the judge into defendant's understanding of the nature of the charge and the harmless error claim of the government rests upon nothing more than the assertion that it may be "assumed" defendant possessed such understanding merely because he expressed a desire to plead guilty. Likewise, it would not be harmless error if the trial judge totally abdicated to the prosecutor the responsibility for giving to the defendant the various Rule 11 warnings, as this "results in the creation of an atmosphere of subtle coercion that clearly contravenes the policy behind Rule 11." United States v. Crook, 526 F.2d 708 (5th Cir.1976).

Indeed, it is fair to say that the kinds of Rule 11 violations which might be found to constitute harmless error upon direct appeal are fairly limited, as in such instances the matter "must be resolved solely on the basis of the Rule 11 transcript" and the other portions (e.g., sentencing hearing) of the limited record made in such cases. United States v. Coronado, supra. Illustrative are: where the judge's compliance with subdivision (c)(1) was not absolutely complete, in that some essential element of the crime was not mentioned, but the defendant's

responses clearly indicate his awareness of that element, see United States v. Coronado, supra; where the judge's compliance with subdivision (c)(2) was erroneous in part in that the judge understated the maximum penalty somewhat, but the penalty actually imposed did not exceed that indicated in the warnings, see United States v. Peters, supra; and where the judge completely failed to comply with subdivision (c)(5), which of course has no bearing on the validity of the plea itself, cf. United States v. Sinagub, supra.

The second cautionary note is that subdivision (h) should not be read as an invitation to trial judges to take a more casual approach to Rule 11 proceedings. It is still true, as the Supreme Court pointed out in McCarthy, that thoughtful and careful compliance with Rule 11 best serves the cause of fair and efficient administration of criminal justice, as it

> will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate. It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking.

Subdivision (h) makes no change in the responsibilities of the judge at Rule 11 proceedings, but instead merely rejects the extreme sanction of automatic reversal.

It must also be emphasized that a harmless error provision has been added to Rule 11 because some courts have read McCarthy as meaning that the general harmless error provision in Rule 52(a) cannot be utilized with respect to Rule 11 proceedings. Thus, the addition of subdivision (h) should not be read as suggesting that Rule 52(a) does not apply in other circumstances because of the absence of a provision comparable to subdivision (h) attached to other rules.

1985 Amendment

Subd. (c)(1). Section 5 of the Victim and Witness Protection Act of 1982, Pub.L. No. 97-291, 96 Stat. 1248 (1982), adds 18 U.S.C. §3579, providing that when sentencing a defendant convicted of a Title 18 offense or of violating various subsections of the Federal Aviation Act of 1958, the court "may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense." Under the law restitution is favored; if the court "does not order restitution, or orders only partial restitution . . . the court shall state on the record the reasons therefor." Because this restitution is deemed an aspect of the defendant's sentence, S.Rept. No. 97-532, 97th Cong., 2d Sess., 30-33 (1982), it is a matter about which a defendant tendering a plea of guilty or nolo contendere should be advised.

Because this new legislation contemplates that the amount of the restitution to be ordered will be ascertained later in the sentencing process, this amendment to Rule 11(c)(1) merely requires that the defendant be told of the court's power to order restitution. The exact amount or upper limit cannot and need not be stated at the time of the plea. Failure of a court to advise a defendant of the possibility of a restitution order would constitute harmless error under subdivision (h) if no restitution were thereafter ordered.